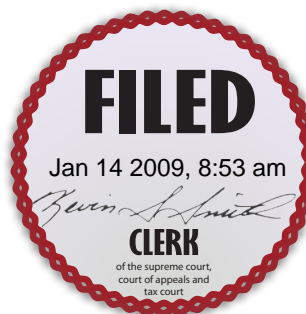


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



PRO SE APPELLANT:

**ERNEST MANCE**  
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ATTORNEYS FOR APPELLEE:

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Attorney General of Indiana

**RICHARD C. WEBSTER**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ERNEST MANCE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A04-0806-PC-369

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Kathleen Sullivan, Judge Pro Tempore  
Cause No. 45G02-0603-PC-3

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**January 14, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Following his two convictions for murder, Ernest Mance, *pro se*, appeals the post-conviction court's denial of his petition for post-conviction relief. Specifically, he contends that his trial counsel was ineffective for failing to (1) voir dire members of the jury to determine whether they overheard a fellow juror make calls on her cell phone in the jury room during deliberations and whether the substance of those phone calls pertained to a matter pending before the jury and (2) object to three jury instructions. He also contends that the post-conviction court erred in denying his motion for discovery. Finding no ineffective assistance of trial counsel and no abuse of discretion in the court's denial of Mance's discovery motion, we affirm the post-conviction court.

## **Facts and Procedural History**

The underlying facts of this case, taken from this Court's opinion on direct appeal, are as follows:

On April 11, 2003, Denise Weaver ("Weaver") was at her home in Gary, Indiana with her three children, who were playing in the back yard. Several other children joined them in the back yard and they began to argue. Weaver came outside and told the visiting children to go home. Later, one of the children returned with her mother, Rachel Mahan ("Mahan"). A physical altercation ensued between Mahan and Weaver's boyfriend, Troy Myers ("Myers"). Myers pulled Mahan from her truck and caused her to fall to the ground and hit her head.

Later that evening, Mahan had a group of visitors, including her brother, Kennedy Deadwilder, her niece Latoya Jefferson, her nephew John Dixon, their uncle Tyrone Davis and Mance, who was Latoya's boyfriend. Mahan told the visitors that Myers "jumped her and took her money and identification." Mance went to his mother's house, retrieved his AK-47 rifle and returned to Mahan's residence.

At approximately 10:00 p.m., Mahan, Deadwilder, Jefferson, Mance, Dixon and Davis walked to Weaver's residence. One of the group kicked in the front door. Mance chased Myers down a hallway and shot him six times. Mahan discovered that Weaver was running out the back door and

she instructed Mance to “get her.” Mance chased down Weaver in the back yard, and shot her nine times. Weaver and Myers died at the scene as a result of massive gunshot wounds.

Mance fled to Chicago, but returned to Indiana and surrendered to police. He gave two statements to police, one in which he denied being the shooter, and a second in which he admitted shooting Weaver and Myers.

*Mance v. State*, No. 45A03-0501-CR-6 (Ind. Ct. App. Oct. 4, 2005) (citations omitted).

The State charged Mance with two counts of murder. A jury found him guilty, and the trial court sentenced him to 120 years. Mance appealed, and this Court affirmed his convictions and sentence on direct appeal. *Id.*

In August 2006, Mance filed a *pro se* petition for post-conviction relief, which he amended in July 2007. In August 2007, Mance filed a motion for discovery, which the post-conviction court denied. Mance filed a motion to reconsider, which the court also denied. The post-conviction court held a hearing on Mance’s petition in September 2007. In May 2008, the court issued findings of fact and conclusions of law denying relief. The relevant findings provide:

6. . . . The petitioner called his trial counsel, Patrick Young, to provide testimony. Mr. Young testified that he recalled the issue of possible juror misconduct relating to one of the jurors using their cell phone. Mr. Young admitted that after the Court’s own questioning of the specific juror outside the presence of the rest of the jury, he did not object or question the jury further regarding the use of the cell phone or the replacement of that juror with the first alternate.

Mr. Young testified he did not object to Final Instructions No. 1, No. 8, or No. 12. Mr. Young testified he did not believe that there were any problems with Final Instructions No. 1, No. 8, or No. 12, and that he had seen the same jury instructions used at least ten times before.

Appellant’s App. p. 21-22. The relevant conclusions provide:

4. Petitioner’s claim that trial counsel was ineffective due to his failure to object and inquire further regarding alleged juror misconduct is without merit. The Court conducted a hearing outside the presence of the

rest of the jury where the Court questioned Juror #10 regarding phone calls she had made and Juror #10 advised she had called her husband and her babysitter and that the case was not discussed. Juror #10 also stated that no other members of the Jury heard her telephone conversation. Juror #10 was subsequently removed from the panel and replaced by the first alternate. In general, a rebuttable presumption of prejudice arises from juror misconduct involving out-of-court communications. Such misconduct must, however, be based on proof, by a preponderance of the evidence, that the extra-judicial contact or communication actually occurred and that it pertained to a matter before the jury. In this case the Court did inquire of Juror #10 regarding the extra-judicial contact and the juror responded that the contact did not pertain to a matter before the jury and that no other members of the panel heard her conversation. The Court had inquired and found that the extra-judicial contact or communication did not pertain to a matter before the jury, therefore trial counsel's failure to further voir dire the jury panel and alternates did not rise to the level of ineffective assistance of counsel. . .

5. Petitioner's claim that trial counsel's failure to object to Final Instructions No. 1, No. 8, and No. 12 constituted ineffective assistance of counsel is without merit. First, petitioner is attempting to couch the issue of the legality of the final instructions in terms of ineffective assistance of counsel, however the issue petitioner presents was known and available at the time of the direct appeal yet not raised. Claims that were known and available at the time of the direct appeal yet not raised are deemed waived. Further, since petitioner did not contemporaneously object to the . . . Final Instructions No. 1, No. 8, and No. 12, the Court must find that there was fundamental error in giving those instructions. Fundamental error is one which is blatant and which if not rectified would deny a petitioner fundamental due process. However, the Court finds that Final Instructions No. 1, No. 8, and No. 12 are correct statements of the law and when read together and construed as whole with the remaining instructions the Court does not find error that is blatant nor any error that would deny petitioner fundamental due process.

*Id.* at 23-24 (citations omitted). Mance, *pro se*, now appeals.

### **Discussion and Decision**

Mance contends that the post-conviction court erred in denying his petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881

N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court’s legal conclusions, “[a] post-conviction court’s findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.” *Id.* (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh’g denied*).

On appeal, Mance alleges trial counsel ineffectiveness. We review the effectiveness of trial counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh’g denied*. A claimant must demonstrate that counsel’s performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. “Prejudice occurs when the defendant demonstrates that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability arises when there is a “probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694).

## **I. Cell Phone Calls**

Mance first contends that his trial counsel was ineffective for failing to voir dire members of the jury to determine whether they overheard a fellow juror make calls on her cell phone in the jury room during deliberations and whether the substance of those phone calls pertained to a matter pending before the jury.

During deliberations, it was brought to the attention of the trial judge that Juror #10, despite being advised that cell phones were not allowed in the jury room, had placed two calls on her cell phone. The judge summoned Juror #10 into the courtroom, and the following exchange occurred:

BY THE COURT:

Were the other jurors able to hear the phone calls that you made?

BY THE JUROR:

The cell phone, I didn't know I had it in my big purse. It was never brought into the courtroom. When I found it in my side zipper, I turned it off immediately. I only called my husband and babysitter because I completely forgot about my daughter where she was at after school and I was suppose[d] to pick her up or my husband was to pick her up by seven.

BY THE COURT:

Certainly in that situation normally what would happen is you buzz and the bailiffs would permit you to make the phone call outside the hearing of the other jurors. Do you know if any of the other jurors heard your conversation, I guess is what I'm asking.

BY THE JUROR[]:

No.

BY THE COURT:

And the case wasn't discussed at all on the phone, is that right?

BY THE JUROR[]:

No, no, no.

BY THE COURT:

Does either side have any questions?

[BY PROSECUTOR]:

No, Judge.

[BY DEFENSE COUNSEL]:

No.

BY THE COURT:

Having discussed this with the parties, I think . . . at this point we're going to go ahead and excuse you and let you go home and we'll replace you then with one of the other jurors.

Appellant's App. p. 227-29.

Mance argues that because Juror #10 answered "no" to the trial judge's question as to whether she knew if the jurors had overheard her cell phone conversations, his trial counsel "had a duty to voir dire the remaining jurors and alternates to better determine whether the phone conversations pertained to a matter before the jury." Appellant's Br. p. 12.

With specific reference to jurors communicating with outside people during deliberations, there is a rebuttable presumption of prejudice arising from such juror misconduct but only if there is proof, by a preponderance of the evidence, that an extra-judicial contact or communication occurred and that it pertained to a matter pending before the jury. *Pagan v. State*, 809 N.E.2d 915, 921 (Ind. Ct. App. 2004) (citing *Currin v. State*, 497 N.E.2d 1045, 1046 (Ind. 1986)), *trans. denied*. In addition, juror misconduct warrants a new trial only if the misconduct is gross and probably harmed the defendant. *Myers v. State*, 887 N.E.2d 170, 194 (Ind. Ct. App. 2008), *reh'g denied, trans. denied*.

The record reflects that Juror #10 was adamant that her cell phone conversations pertained to her daughter and not to a matter pending before the jury. There is simply no evidence that Juror #10 discussed a matter pending before the jury. The judge, prosecutor, and Mance's trial counsel were satisfied with Juror #10's assurance in this regard. As such, Mance's trial counsel was not ineffective for failing to voir dire the other members of the jury to determine *if* they overheard Juror #10's cell phone

conversations and whether her conversations pertained to a matter pending before the jury.

In a related argument, Mance argues that the post-conviction court erred in denying his motion for discovery and motion to reconsider. Specifically, Mance filed a motion pursuant to Post-Conviction Rule 1, § 5<sup>1</sup> asking the Lake County Prosecutor “to disclose and produce for examination, inspection and copying the Jury Questionnaire including the address for each juror (including the alternates) that sat in the deliberation room during jury deliberations in this cause.” Appellant’s App. p. 64. Mance wanted to serve the jurors and alternates with interrogatories, depositions by written questions, and subpoenas “to testify to support his claim of ineffective assistance of trial counsel for failure to voir dire the jury.” Appellant’s Br. p. 9. The court denied Mance’s motion. Mance filed a motion to reconsider, which the court also denied.

Our standard of review in discovery matters is abuse of discretion. *Williams v. State*, 819 N.E.2d 381, 384 (Ind. Ct. App. 2004), *trans. denied*. Thus, we will reverse only where the trial court has reached an erroneous conclusion that is clearly against the logic and effect of the facts of the case. *Id.* Moreover, “[d]ue to the fact-sensitive nature of discovery matters, the ruling of the trial court is cloaked in a strong presumption of correctness on appeal.” *Id.* (quotation omitted).

“The filing of a petition for PCR is not a license to obtain unlimited information from the State, but a means through which a defendant may demonstrate to a reviewing court that he was convicted or sentenced in violation of his rights.” *Roche v. State*, 690

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<sup>1</sup> “All rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are available to the parties, except as provided above in Section 4(b).”



N.E.2d 1115, 1132 (Ind. 1997). “PCR is not a device for investigating possible claims, but a means for vindicating actual claims.” *Id.* (quotation omitted). In addition, “[t]here is no postconviction right to ‘fish’ through official files for belated grounds of attack on the judgment or to confirm mere speculation or hope that a basis for collateral relief may exist.” *Brown v. State*, 698 N.E.2d 1132, 1139 (Ind. 1998) (quotation omitted), *reh’g denied*.

Here, Mance’s motion for discovery and motion to reconsider provide no basis for his belief that Juror #10’s cell phone conversations pertained to a matter pending before the jury. *See* Appellant’s App. p. 35-37, 64-65. Rather, his motions are based on mere speculation. Instead, all evidence points to the conclusion that Juror #10 called her husband and babysitter and that the content of her conversations concerned her daughter. The post-conviction court acted within its discretion in refusing to let Mance proceed on a fishing expedition.

## **II. Jury Instructions**

For his second allegation of ineffective assistance of counsel, Mance argues that his trial counsel was ineffective because he failed to object to jury instructions 1, 8, and 12. *See* Appellant’s Br. p. 8. This issue is complicated on appeal in light of the post-conviction court’s conclusion that Mance should have raised it as fundamental error, not ineffective assistance of counsel, because counsel did not object to the instructions at trial and therefore waived the issue. *See* Appellant’s App. p. 23 (Conclusion No. 5). However, the fundamental error exception to the contemporaneous objection rule applies to direct appeals. *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002). “In post-conviction

proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.” *Id.* Accordingly, Mance properly raised this issue as ineffective assistance of counsel for failing to object to the instructions.

Nevertheless, because Mance does not make any argument on appeal why these three instructions are erroneous (probably because he mistakenly believes that the post-conviction court indeed found fundamental error), he has waived this issue for our review. *See* Ind. Appellate Rule 46(A)(8)(a).

Affirmed.

RILEY, J., and DARDEN, J., concur.